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20 **IN THE UNITED STATES DISTRICT COURT**

21
22 **FOR THE DISTRICT OF ARIZONA**

23 Justin Downing, individually and on behalf
24 of all others similarly situated,

25 Plaintiff,

26 vs.

27 Lowe's Home Centers, LLC, a North
28 Carolina limited liability company; and First
Advantage Background Services Corp., a
Florida corporation,

Defendants.

Case No.: CV-22-08159-PCT-SPL

**DEFENDANT FIRST ADVANTAGE
BACKGROUND SERVICES CORP.'S
ANSWER AND DEFENSES**

Defendant First Advantage Background Services Corp. ("First Advantage" or
"Defendant") submits this, its Answer and Defenses to the Second Amended Class Action

1 Complaint (“Second Amended Complaint”) filed by Justin Downing (“Plaintiff”),
2 respectfully showing the Court as follows:

3 **ANSWER**

4 1. Enacted to promote the accuracy, fairness, and privacy of consumer
5 information contained in the files of consumer reporting agencies, the FCRA explicitly
6 protects consumer from disclosure of their personal information contained in their
7 consumer reports. To that end, employers who obtain and use consumer reports regarding
8 their job applicants and employees are required to provide, prior to obtaining consumer
9 reports in the first place, a clear and conspicuous disclosure, in a document consisting
10 solely of the disclosure (*i.e.*, that stands alone), that a consumer report will be obtained for
11 employment purposes. And for their part, when preparing the reports, consumer reporting
agencies must implement and follow procedures designed to ensure maximum possible
accuracy of the information they provide concerning the individuals about whom the
reports relate and to ensure that the information is complete and up to date.

12 **RESPONSE:** First Advantage admits that the FCRA is a federal statute that is
13 designed to address a number of issues, including those involving consumers and
14 information contained in consumer reports. First Advantage admits that 15 U.S.C. §
15 1681b(b)(2)(A) states “Except as provided in subparagraph (B), a person may not procure
16 a consumer report, or cause a consumer report to be procured, for employment purposes
17 with respect to any consumer, unless – a clear and conspicuous disclosure has been made
18 in writing to the consumer at any time before the report is procured or caused to be
19 procured, in a document that consists solely of the disclosure, that a consumer report may
20 be obtained for employment purposes.” First Advantage admits that 15 U.S.C. § 1681e(b)
21 states “Whenever a consumer reporting agency prepares a consumer report it shall follow
22 reasonable procedures to assure maximum possible accuracy of the information concerning
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1 the individual about whom the report relates.” First Advantage denies any and all
2 remaining allegations in paragraph 1 of the Second Amended Complaint.

3
4 2. Defendant Lowe’s willfully violated the FCRA by: (1) failing to provide a
5 standalone, upfront disclosure that Defendant may procure consumer reports about its
6 applicants and employees, and (2) failing to provide a clear and conspicuous disclosure
prior to obtaining consumer reports.

7 **RESPONSE:** First Advantage is without knowledge or information sufficient
8 to form a belief as to the truth of the allegations in paragraph 2 of the Second Amended
9 Complaint. Accordingly, those allegations are denied.
10

11 3. Lowe’s willfully violated the FCRA by failing to provide applicants or
12 employees with a standalone disclosure that clearly and conspicuously indicates—in a
13 document consisting solely of the disclosure—that Lowe’s may obtain a consumer report
14 about them for employment purposes. That is, Lowe’s provides a single disclosure that
15 includes extraneous information regarding Lowe’s supposed ability to obtain consumer
16 reports regarding the applicant’s children/wards. The disclosure also contains additional
extraneous information regarding future disclosures and authorizations that may be sought.

17 **RESPONSE:** First Advantage is without knowledge or information sufficient
18 to form a belief as to the truth of the allegations in paragraph 3 of the Second Amended
19 Complaint. Accordingly, those allegations are denied.
20

21 4. The inclusion of such extraneous information overshadows the consumer
22 report disclosure and renders the disclosure confusing to Plaintiff and to any reasonable
23 person. By including extraneous information, it is unclear as to whether Lowe’s intends to
24 procure a consumer report regarding the applicant, their children/wards, or both. This lack
25 of clarity frustrates the purpose of the FCRA, which is to inform consumers and allow them
26 a meaningful opportunity to authorize such disclosures. Plaintiff was confused by the
27 disclosure, and had a lawful disclosure been provided, Plaintiff would not have signed it.
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1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 4 of the Second Amended
3 Complaint. Accordingly, those allegations are denied.
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5 5. For its part, Defendant First Advantage willfully violated the FCRA by
6 furnishing consumer reports while failing to implement and follow reasonable procedures
7 to ensure the maximum possible accuracy of the information contained in the report. That
8 is, First Advantage compiled consumer reports regarding Plaintiff and class members that
included inaccurate dispositions of past criminal histories.

9 **RESPONSE:** First Advantage denies the allegations in paragraph 5 of the
10 Second Amended Complaint.
11

12 6. First Advantage also willfully violated, and continues to violate, the FCRA
13 by failing to maintain (or follow) strict procedures designed to ensure that public record
14 information is complete and up to date when it is included in consumer reports and is likely
15 to have an adverse effect on a consumer's ability to obtain employment. Here, First
16 Advantage furnished consumer reports relating to Plaintiff and class members containing
outdated and incomplete dispositions of past criminal histories.

17 **RESPONSE:** First Advantage denies the allegations in paragraph 6 of the
18 Second Amended Complaint.
19

20 7. By failing to adopt (or follow) reasonable or strict procedures as required,
21 First Advantage furnished consumer reports to third parties that contained both false and
22 misleading information, which had an adverse effect on consumers' ability to obtain
employment.

23 **RESPONSE:** First Advantage denies the allegations in paragraph 7 of the
24 Second Amended Complaint.
25

26 8. Additionally, First Advantage also willfully violated the FCRA by failing to
27 provide notice to consumers that adverse public record information was being conveyed to
28 potential employers. First Advantage deprived applicants of an opportunity to correct the
false and misleading information.

1 **RESPONSE:** First Advantage denies the allegations in paragraph 8 of the
2 Second Amended Complaint.

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4 9. As a result of Defendants' willful violations of the FCRA, Plaintiff Downing
5 and the members of the Classes were deprived of their privacy rights guaranteed to them
6 by federal law, and they are therefore entitled to statutory damages of at least \$100 and not
more than \$1,000 for each willful violation. *See* 15 U.S.C. § 1681n(a)(1)(A).

7 **RESPONSE:** First Advantage denies the allegations in paragraph 9 of the
8 Second Amended Complaint.

9
10 **PARTIES**

11 10. Plaintiff Downing is a natural person and citizen of the State of Arizona. He
12 resides in Show Low, Navajo County, Arizona.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 10 of the Second Amended
15 Complaint. Accordingly, those allegations are denied.

16
17 11. Defendant Lowe's is a North Carolina limited liability company with its
18 principal place of business located at 1000 Lowe's Blvd, Mooresville, North Carolina
19 28117.

20 **RESPONSE:** First Advantage is without knowledge or information sufficient
21 to form a belief as to the truth of the allegations in paragraph 11 of the Second Amended
22 Complaint. Accordingly, those allegations are denied.

23
24 12. Defendant First Advantage is a Florida corporation with its principal place of
25 business located at 1 Concourse Pkwy NE, Suite 200, Atlanta, GA 30328.

26 **RESPONSE:** First Advantage admits that it is incorporated in Florida and
27 admits that its principal place of business is located at 1 Concourse Pkwy NE, Suite 200,
28

1 Atlanta, GA 30328. First Advantage denies any and all remaining allegations in paragraph
2 12 of the Second Amended Complaint.

3
4 13. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this
5 action arises under the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., which is a
6 federal statute. Jurisdiction is additionally proper under the Class Action Fairness Act, 28
7 U.S.C. § 1332(d), et seq. (“CAFA”), because the classes each consist of over 100 people,
there is minimal diversity, and the amount in controversy, when aggregated, is over
\$5,000,000. Further, none of the exceptions to CAFA jurisdiction apply.

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9 **RESPONSE:** First Advantage admits that Plaintiff has asserted claims under
10 the Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., and that the Court has subject
11 matter jurisdiction under 28 U.S.C. § 1331. Plaintiff is without knowledge or information
12 sufficient to form a belief as to the truth of the allegations that “the classes each consist of
13 over 100 people, there is minimal diversity, and the amount in controversy, when
14 aggregated, is over \$5,000,000 [and that] none of the exceptions to CAFA jurisdiction
15 apply.” Accordingly, those allegations are denied. First Advantage denies any and all
16 remaining allegations in paragraph 13 of the Second Amended Complaint.
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20 14. This Court has personal jurisdiction over Defendants because they conduct
21 substantial business in this District and the unlawful conduct alleged in the Complaint
22 occurred in this District or the unlawful decisions that lead to the violations of the FCRA
set forth in this Complaint were made in this District.

23
24 **RESPONSE:** First Advantage admits that, in this case, it conducted business
25 in this judicial district. First Advantage denies any and all remaining allegations in
26 paragraph 14 of the Second Amended Complaint as alleged against it and denies any
27 unlawful conduct. First Advantage is without knowledge or information sufficient to form
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1 a belief as to the truth of the allegations in paragraph 14 as alleged against the other
2 defendant. Accordingly, those allegations are denied.

3
4 15. Venue is proper in this District under 28 U.S.C. § 1391 because a substantial
5 part of the events and omissions giving rise to the claims occurred in or emanated from this
6 District, and because Plaintiff resides in this District and applied for work with Lowe's in
7 this District.

8
9 **RESPONSE:** Admitted.

10 16. Lowe's is a well-known American retail company specializing in home
11 improvement. It operates warehouse-style home improvement stores throughout the United
12 States, including Arizona.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 16 of the Second Amended
15 Complaint. Accordingly, those allegations are denied.

16 17. First Advantage is a consumer reporting agency that collects and aggregates
17 information about consumers world-wide. First Advantage generates a substantial portion
18 of its business and income by providing background screening services to employers
19 nationwide.

20 **RESPONSE:** First Advantage admits that it performs some actions and
21 conducts some aspects of its business in a manner that may qualify it as a consumer
22 reporting agency, and that it performs other actions and conducts other aspects of its
23 business in a manner that would not qualify it as a consumer reporting agency. First
24 Advantage admits that some aspects of its business include providing employment
25 background screening services, while other aspects of its business do not. First Advantage
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1 denies any and all remaining allegations in paragraph 17 of the Second Amended
2 Complaint.

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4 18. In or around February 2022, Plaintiff applied for a job with Lowe's at a store
located in Show Low, Arizona.

5
6 **RESPONSE:** First Advantage is without knowledge or information sufficient
7 to form a belief as to the truth of the allegations in paragraph 18 of the Second Amended
8 Complaint. Accordingly, those allegations are denied.

9
10 19. In or around February 2022, in connection with his employment application,
11 Plaintiff was required to complete various acknowledgements of company disclosures,
including a disclosure regarding Plaintiff's background report.

12
13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 19 of the Second Amended
15 Complaint. Accordingly, those allegations are denied.

16
17 20. Rather than provide a standalone disclosure—as the FCRA unambiguously
18 requires—Plaintiff was presented with a document styled, "Disclosure Regarding
19 Background Report." (See FCRA Disclosure, a true and accurate copy of which is attached
20 hereto as Ex. A.) The pre-report disclosure that Lowe's provided to applicants and
employees unlawfully combines disclosures to obtain consumer reports regarding
applicants and their children or wards. It states:

21
22 Lowe's Companies, Inc. and/or its affiliates, including Lowe's Home Centers,
23 LLC, ("Lowe's") may obtain a "background report" about you or your
24 child/ward for employment purposes from a third-party consumer reporting
agency. "Background report" means any written, oral, or other communication
25 of any information by a consumer reporting agency bearing on your or your
26 child's/ward's credit worthiness, credit standing, credit capacity, character,
general reputation, personal characteristics, or mode of living. The reports
27 may include information regarding your or your child's/ward's history,
criminal history, social security verification, motor vehicle records,
28 verification of your education or employment history, or other background

1 check results. Lowe's will not request any information related to your or your
2 child's/ward's worthiness, credit standing, or credit capacity without providing
3 you or your child/ward, separately, with information related to the use of that
4 information and obtaining separate authorization from you to obtain such
5 information, where required.

6 **RESPONSE:** First Advantage is without knowledge or information sufficient
7 to form a belief as to the truth of the allegations in paragraph 20 of the Second Amended
8 Complaint. Accordingly, those allegations are denied.

9 21. That is, Lowe's provides a single disclosure that seeks to satisfy the disclosure
10 requirements for it to obtain a consumer report regarding both the applicants and their
11 children, including their or their children's criminal history, motor vehicle records, credit
12 standing, credit capacity, educational history, employment history and more.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 21 of the Second Amended
15 Complaint. Accordingly, those allegations are denied.

16 22. The disclosure also contains additional extraneous information: Despite
17 initially explaining that a consumer report may contain information relating to the
18 applicant's or their children's credit worthiness, credit standing, and credit capacity, in the
19 very next paragraph Lowe's purports to explain that it will not request any information
20 relates to applicant's or their children's "worthiness, credit standing, or credit capacity"
21 unless it provides a separate disclosure and authorization for credit information.

22 **RESPONSE:** First Advantage is without knowledge or information sufficient
23 to form a belief as to the truth of the allegations in paragraph 22 of the Second Amended
24 Complaint. Accordingly, those allegations are denied.

25 23. The disclosure does not standalone, nor is it clear and conspicuous. It is
26 opaque and confusing.
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1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 23 of the Second Amended
3 Complaint. Accordingly, those allegations are denied.
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5 24. The inclusion of such extraneous information overshadows the consumer
6 report disclosure and renders the disclosure confusing to Plaintiff and the other class
7 members. By combining the disclosure to obtain an applicant's consumer report with a
8 disclosure to obtain information about their child or ward in a single document, and by
9 including a confusing and conflicting explanation regarding future disclosures, it is unclear
10 whether Lowe's intends to procure consumer reports regarding applicants, their
11 children/wards, or both. Nowhere does Lowe's make any attempt to explain why it would
12 need to access the consumer report of an applicant's children, wards, or other offspring.
This lack of clarity frustrates the purpose of the FCRA, which is to inform consumers and
allow them a meaningful opportunity to authorize such disclosures. Had a lawful disclosure
been provided, Plaintiff and others would not have signed it.

13 **RESPONSE:** First Advantage is without knowledge or information sufficient
14 to form a belief as to the truth of the allegations in paragraph 24 of the Second Amended
15 Complaint. Accordingly, those allegations are denied.
16

17 25. For its part, First Advantage furnished consumer reports to Lowe's and other
18 potential employers without first implementing reasonable procedures to ensure the
19 maximum possible accuracy of the information contained in the report, and failed to
20 implement strict procedures designed to ensure that when public information contained in
21 a consumer report is likely to have an adverse effect on a consumer's ability to obtain
employment, that such sensitive information is complete and up to date.

22 **RESPONSE:** First Advantage denies the allegations in paragraph 25 of the
23 Second Amended Complaint.
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25 26. Lowe's contracted with First Advantage to compile and furnish a consumer
26 report regarding Downing and other class members for employment purposes.
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1 **RESPONSE:** First Advantage admits that Lowe’s engaged First Advantage to
2 conduct a background check regarding Plaintiff. First Advantage is without knowledge or
3 information sufficient to form a belief as to the truth of the remaining allegations in
4 paragraph 26 of the Second Amended Complaint. Accordingly, those allegations are
5 denied.
6

7
8 27. On or about February 26, 2022, First Advantage commenced a search for
9 Plaintiff’s past criminal history, to be included in his consumer report.

10 **RESPONSE:** First Advantage admits that it began preparing a background
11 report regarding Plaintiff on or about February 26, 2022. First Advantage denies any and
12 all remaining allegations in paragraph 27 of the Second Amended Complaint.
13

14 28. After the search commenced, First Advantage noted that additional handling
15 was required with respect to Plaintiff’s past criminal history.

16 **RESPONSE:** First Advantage admits that under a Source Status History
17 section of Plaintiff’s background report is the notation “Additional handing required.” First
18 Advantage denies any and all remaining allegations in paragraph 28 of the Second
19 Amended Complaint.
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22 29. On February 26, 2022, First Advantage again noted that research was required
23 with respect to Plaintiff’s past criminal history.

24 **RESPONSE:** First Advantage admits that under an Order Process History
25 heading in Plaintiff’s background report is the notation “26/Feb/2022 02:25:23 PM
26 Research Required.” First Advantage denies any and all remaining allegations in paragraph
27 29 of the Second Amended Complaint.
28

1 30. On March 2, 2022, First Advantage again noted that research was required
2 with respect to Plaintiff's past criminal history.

3 **RESPONSE:** First Advantage admits that under an Order Process History
4 heading in Plaintiff's background report is the notation "02/Mar/2022 02:49:28 PM
5 Research Required." First Advantage denies any and all remaining allegations in paragraph
6 30 of the Second Amended Complaint.
7

8 31. On March 2, 2022, First Advantage furnished a consumer report regarding
9 Plaintiff to Lowe's for employment purposes.

10 **RESPONSE:** First Advantage admits that, on or about March 2, 2022, it
11 completed its background report regarding Plaintiff and provided it to Lowe's. First
12 Advantage denies any and all remaining allegations in paragraph 31 of the Second
13 Amended Complaint.
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16 32. The report included inaccurate and materially misleading information relating
17 to Plaintiff's prior criminal history, which had a negative impact on his employment
18 opportunities. In preparing the report, First Advantage failed to follow reasonable
19 procedures to ensure the maximum possible accuracy of the information contained in the
20 report. Instead, First Advantage furnished an inaccurate report containing three past
21 criminal convictions with the disposition stated as "guilty."

22 **RESPONSE:** First Advantage denies the allegations in paragraph 32 of the
23 Second Amended Complaint.

24 33. While Plaintiff did plead guilty to the three criminal charges between 2006
25 and 2009, it is not accurate to state that the disposition of those cases is "guilty."

26 **RESPONSE:** First Advantage denies the allegations in paragraph 33 of the
27 Second Amended Complaint.
28

34. On November 24, 2020, the Navajo County Superior Court issued an Order setting aside Plaintiff's judgments of guilt (*see* Order Setting Aside Judgment of Guilt, a true and accurate copy of which is attached hereto as Ex. B), which restored Plaintiff's civil rights under Arizona law pursuant to A.R.S. § 13-905. Order setting aside the judgments of guilt were made publicly available at <https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

RESPONSE: First Advantage admits that a Minute Entry by the Superior Court of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among other things, "IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to include the restoration of the Defendant's civil rights and his right to own firearms." First Advantage denies any and all remaining allegations in paragraph 34 of the Second Amended Complaint.

35. Judgments setting aside guilt are not some arbitrary distinction. Rather, when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and includes a certificate of second chance, the individual's civil rights are restored, including occupational rights. The restoration of rights includes the release of the individual from all barriers and disabilities in obtaining occupational licenses issued under Arizona Title 32. *See*. A.R.S. § 13-905(K). Further, Arizona law provides potential employers with protection should they choose to hire individuals that have had their convictions set aside. *Id.*; *see also* A.R.S. § 12-558.03, *et seq.*

RESPONSE: First Advantage admits that, as amended by AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-905(A) currently states "Except as provided in subsection P of this section, every person convicted of a criminal offense, on fulfillment of the conditions of probation or sentence and discharge by the court, may apply to the court to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of sentencing. The court may issue an order that

1 includes a certificate of second chance to a person whose judgment of guilt is set aside
2 pursuant to subsection K or N of this section.” First Advantage admits that, as amended by
3 AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-
4 905(D) currently states “If the application is granted, the court shall set aside the judgment
5 of guilt, dismiss the complaint, information or indictment and order that the person be
6 released from all penalties and disabilities resulting from the conviction except those
7 imposed by: 1. The department of transportation pursuant to section 28–3304, 28–3305,
8 28–3306, 28–3307, 28–3308, 28–3312 or 28–3319. 2. The game and fish commission
9 pursuant to section 17–314 or 17–340.” First Advantage further admits that, as amended
10 by AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-
11 905(E) currently states “A conviction that is set aside may be: 1. Used as a conviction if
12 the conviction would be admissible had it not been set aside. 2. Alleged as an element of
13 an offense. 3. Used as a prior conviction. 4. Pleaded and proved in any subsequent
14 prosecution of the person by this state or any political subdivision of this state for any
15 offense. 5. Used by the department of transportation in enforcing section 28–3304, 28–
16 3305, 28–3306, 28–3307, 28–3308, 28–3312 or 28–3319 as if the judgment of guilt had
17 not been set aside.” Finally, First Advantage admits that, as amended by AZ LEGIS 3
18 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), A.R.S. § 13-905(K) currently
19 states “If the court grants the application to set aside the judgment of guilt, the court's order
20 must include a certificate of second chance if the person was convicted of any of the
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1 following: 1. A misdemeanor. 2. A class 4, 5 or 6 felony and at least two years have elapsed
2 since the person fulfilled the conditions of probation or sentence. 3. A class 2 or 3 felony
3 and at least five years have elapsed since the person fulfilled the conditions of probation or
4 sentence.” First Advantage denies any and all remaining allegations in paragraph 35 of the
5 Second Amended Complaint.
6

7
8 36. By failing to inform potential employers that a prior conviction was set aside,
9 First Advantage provides false and inaccurate information that deprives employers of
10 critical data needed to make an informed decisions regarding potential applicants. It also
strips job applicants like Plaintiff from having the ability to attain gainful employment.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 36 of the
12 Second Amended Complaint.
13

14 37. Additionally, despite preparing the report with public record information that
15 was likely to have an adverse effect on Plaintiff’s ability to obtain employment, First
16 Advantage also failed to provide any notice that the information was being furnished to
17 Lowe’s. This failure deprived Plaintiff of a meaningful opportunity to correct the
inaccurate information.

18 **RESPONSE:** First Advantage denies the allegations in paragraph 37 of the
19 Second Amended Complaint.
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21 38. On or around March 10, 2022, Lowe’s informed Plaintiff that he was being
22 denied employment based in whole or in part on information contained within his consumer
23 report.

24 **RESPONSE:** First Advantage is without knowledge or information sufficient
25 to form a belief as to the truth of the allegations in paragraph 38 of the Second Amended
26 Complaint.
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39. Based on foregoing, Plaintiff brings this suit, on behalf of himself and those similarly situated, seeking redress for Defendants' widespread and willful violations of the FCRA. Such violations entitle him, and other similarly situated persons, to statutory damages of not less than \$100 and not more than \$1,000 per violation.

RESPONSE: First Advantage denies the allegations in paragraph 39 of the Second Amended Complaint.

CLASS ACTION ALLEGATIONS

40. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure Rule 23(b)(3) on behalf of himself and the following Classes defined as follows:

Lowe's Class: All persons in the United States who (1) from a date two years prior to the filing of the initial complaint in this action to the date notice is sent to the Class; (2) applied for employment with Lowe's; (3) about whom Lowe's procured a consumer report; and (4) who were provided the same form FCRA disclosure and authorization as the disclosure and authorization form Lowe's provided to Plaintiff.

First Advantage Class: All persons in the United States (1) from a date two years prior to the filing of the initial complaint in this action to the date notice is sent to the Class; (2) about whom First Advantage provided a consumer report; (3) to any employer or potential employer; (4) where the consumer report contained a criminal disposition of "guilty"; and (5) where the consumer's conviction had been set aside pursuant to A.R.S. § 13-905.

RESPONSE: First Advantage admits that Plaintiff purports to bring his claim pursuant to Federal Rule of Civil Procedure 23(b)(3). First Advantage denies any and all remaining allegations in paragraph 40 of the Second Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

41. Excluded from the Classes are (1) Defendants, Defendants' agents, subsidiaries, parents, successors, predecessors, and any entity in which Defendants or their parents have a controlling interest, and those entities' officers and directors, (2) the Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate Judge's immediate family, (3) persons who execute and file a timely request for exclusion, (4)

1 persons who have had their claims in this matter finally adjudicated and/or otherwise
2 released, (5) Plaintiff's and Defendants' counsel, and (6) the legal representatives,
3 successors, and assigns of any such excluded person. Plaintiff anticipates the need to amend
4 the Complaint, including the Class Definitions, following a reasonable period for class
discovery.

5 **RESPONSE:** First Advantage admits that Plaintiff has defined the classes as
6 listed. First Advantage denies any and all remaining allegations in paragraph 41 of the
7 Second Amended Complaint and denies that the proposed "First Advantage Class" is a
8 certifiable class.
9

10 42. **Numerosity:** The exact number of class members is unknown to Plaintiff at
11 this time, but it is clear that individual joinder is impracticable for each of the Classes. On
12 information and belief, there are thousands of individuals that fall into the defined Classes.
13 Further, the class members can readily be ascertained through objective criteria, including
14 Defendants' records.

15 **RESPONSE:** First Advantage denies the allegations in paragraph 42 of the
16 Second Amended Complaint and denies that the proposed "First Advantage Class" is a
17 certifiable class.
18

19 43. **Commonality:** Common questions of law and fact exist as to all members of
20 the Classes for which this proceeding will provide common answers in a single stroke
based upon common evidence, including:

- 21 (a) Whether First Advantage violated the FCRA;
- 22 (b) Whether First Advantage prepared consumer reports with inaccurate
23 criminal dispositions;
- 24 (c) Whether First Advantage implemented policies and procedures to
ensure maximum possible accuracy of the consumer reports that it prepares;
- 25 (d) Whether First Advantage failed to follow its own policies and
26 procedures to ensure the maximum possible accuracy of the consumer reports
that it prepares;
- 27 (e) Whether First Advantage implemented strict procedures to ensure that
28 where adverse public record information reported on a consumer report is

likely to impact an applicant's ability to obtain employment that the information is complete and up to date;

(f) Whether First Advantage failed to follow its own procedures to ensure that adverse public record information that is reported on a consumer report is complete and up to date;

(g) Whether First Advantage's violations of the FCRA were willful;

(h) Whether Lowe's conduct described herein violated the FCRA;

(i) Whether Lowe's has procured or caused to be procured consumer reports about job applicants and employees;

(c) [sic] Whether Lowe's disclosure violates the FCRA's requirement that the pre-report disclosure be clear and conspicuous in a document consisting solely of the disclosure; and

(j) Whether Lowe's violations of the FCRA were willful.

RESPONSE: First Advantage denies the allegations in paragraph 43 of the

Second Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

44. **Typicality:** As a result of Defendants' uniform and repeated pattern of providing and preparing consumer reports, Plaintiff and the Class Members suffered the same injury and similar damages. If Defendants' actions violated the FCRA as to Plaintiff, then it violated the FCRA as to all Class Members. Thus, Plaintiff's claims are typical of the claims of the other Class Members.

RESPONSE: First Advantage denies the allegations in paragraph 44 of the

Second Amended Complaint and denies that the proposed "First Advantage Class" is a certifiable class.

45. **Adequate Representation:** Plaintiff is a member of the Classes and both he and his counsel will fairly and adequately represent and protect the interests of the Classes, as neither has interests adverse to those of the Class Members and Defendants have no defenses unique to Plaintiff. In addition, Plaintiff has retained counsel competent and experienced in complex litigation and class actions including class actions related to the procurement of consumer reports for employment purposes under the Fair Credit Reporting Act. Further, Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the members of the Classes, and they have the financial resources to do so.

1 **RESPONSE:** First Advantage denies the allegations in paragraph 45 of the
2
3 Second Amended Complaint and denies that the proposed “First Advantage Class” is a
4 certifiable class.

5
6 46. **Predominance:** The common questions of law and fact set forth above go to
7 the very heart of the controversy and predominate over any supposed individualized
8 questions. Irrespective of any given Class Member’s situation, the answer to whether
9 Defendants’ conduct described herein repeatedly violated the FCRA is the same for
10 everyone—a resounding “yes”—and the same will be proven using common evidence.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 46 of the
12 Second Amended Complaint and denies that the proposed “First Advantage Class” is a
13 certifiable class.

14 47. **Superiority and Manageability:** A class action is superior to all other
15 methods of adjudicating the controversy. Joinder of all class members is impractical, and
16 the damages suffered by/available to any individual Class Members will likely be small
17 relative to the cost associated with prosecuting a lawsuit. Thus, the expense of litigating an
18 individual action will likely prohibit the Class Members from obtaining effective relief for
19 Defendants’ misconduct. In addition, there are numerous common factual and legal
20 questions that could result in inconsistent verdicts should there be several successive trials.
21 In contrast, a class action will present far fewer management difficulties, and it will
22 increase efficiency and decrease expense. Further, class-wide adjudication will also ensure
23 a uniform decision for the Class Members.

24 **RESPONSE:** First Advantage denies the allegations in paragraph 47 of the
25 Second Amended Complaint and denies that the proposed “First Advantage Class” is a
26 certifiable class.

27 48. Plaintiff reserves the right to revise the definition of the classes as necessary
28 based upon information obtained in discovery.

1 person.” First Advantage denies any and all remaining allegations in paragraph 50 of the
 2 Second Amended Complaint.

3 51. The FCRA defines a consumer report as:

4 . . . any written, oral, or other communication of any information by a
 5 consumer reporting agency bearing on a consumers’ credit worthiness,
 6 credit standing, cred-it capacity, character, general reputation, personal
 7 characteristics, or mode of living which is used or excepted to be used
 8 or collected in whole or in part for the purpose of serving as a factor
 9 establishing the consumer’s eligibility for . . .

(B) employment purposes . . .

10 15 U.S.C. § 1681a(d)(1).

11 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681a(d)(1) states “The
 12 term ‘consumer report’ means any written, oral, or other communication of any
 13 information by a consumer reporting agency bearing on a consumer’s credit worthiness,
 14 credit standing, credit capacity, character, general reputation, personal characteristics, or
 15 mode of living which is used or expected to be used or collected in whole or in part for the
 16 purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or
 17 insurance to be used primarily for personal, family, or household purposes; (B)
 18 employment purposes; or (C) any other purpose authorized under section 1681b of this
 19 title.” First Advantage denies any and all remaining allegations in paragraph 51 of the
 20 Second Amended Complaint.
 21
 22
 23

24 52. Lowe’s employment background checks are consumer reports.
 25
 26
 27
 28

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 52 of the Second Amended
3 Complaint. Accordingly, those allegations are denied.
4

5 53. The pre-report disclosure that Lowe's provided to applicants and employees
6 unlawfully combines a disclosure to obtain consumer reports about them with a disclosure
7 to obtain consumer reports about their children or wards. (Ex. A.) Lowe's provides a single
8 disclosure that confusingly combines information about both the applicants themselves as
9 well as regarding their children or wards, including their or their children's/ward's criminal
10 history, motor vehicle records, credit standing, credit capacity, educational history,
11 employment history and more. (*Id.*)

12 **RESPONSE:** First Advantage is without knowledge or information sufficient
13 to form a belief as to the truth of the allegations in paragraph 53 of the Second Amended
14 Complaint. Accordingly, those allegations are denied.

15 54. The disclosure also contains additional extraneous information that appears
16 confusing and contradictory. (*Id.*) Despite explaining that a consumer report may contain
17 information relating to the applicant's or their children's/ward's credit worthiness, credit
18 standing, and credit capacity, in the very next paragraph Lowe's purports to explain that it
19 will not request any information relates to applicant's or their children's/ward's
20 "worthiness, credit standing, or credit capacity" unless it provides a separate disclosure and
21 authorization for such credit information. (*Id.*)

22 **RESPONSE:** First Advantage is without knowledge or information sufficient
23 to form a belief as to the truth of the allegations in paragraph 54 of the Second Amended
24 Complaint. Accordingly, those allegations are denied.

25 55. By combining the applicant's and their children's/ward's disclosure into one
26 document, and by including a confusing and conflicting explanation regarding disclosures,
27 Lowe's disclosure cannot be said to "stand alone" in a document that consists solely of the
28 disclosure. A reasonable person would not have understood or authorized the reports had
an appropriate disclosures been provided. Plaintiff and the other class members wouldn't
have authorized the reports had appropriate disclosures been provided.

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
 2
 3 to form a belief as to the truth of the allegations in paragraph 55 of the Second Amended
 4 Complaint. Accordingly, those allegations are denied.

5
 6 56. Defendant procured consumer reports with respect to Plaintiff and the Lowe's
 7 Class. The disclosures provided to Plaintiff were the same or substantially the same as the
 8 one provided to all Lowe's Class members. Thus, Defendant uniformly violated the FCRA
 9 rights of all Class members in the same way and, in the process, violated their right to
 information and their privacy rights as delineated by Congress.

10 **RESPONSE:** First Advantage admits that on February 26, 2022, Lowe's
 11 ordered a background report regarding Plaintiff from its subsidiary First Advantage
 12 Background Services Corp. First Advantage is without knowledge or information
 13 sufficient to form a belief as to the truth of the allegations in paragraph 56 of the Second
 14 Amended Complaint. Accordingly, those allegations are denied.

15
 16
 17 57. Defendant's violations of 15 U.S.C. 1681b(b)(2)(A)(i) was willful for at least
 18 the following reasons:

19 (i) The rule that FRCA disclosures consist "solely" of that disclosure has
 20 been the law established for well over a decade.

21 (ii) Lowe's is a large company who regularly engages outside counsel—it
 22 had ample means and opportunity to seek legal advice regarding its FCRA
 23 responsibilities. As such, any violations were made in conscious disregard of
 24 the rights of others.

25 (iii) Lowe's previously settled a class action lawsuit for alleged violations
 26 of the FCRA's stand alone disclosure requirements. As such, its failure to
 27 comply with the FCRA cannot be seen as anything other than a willful
 28 defiance of the Act's requirements.

(iv) Lowe's inclusion of the disclosures relating to applicant's children or
 wards was intentional and serves no purpose to the vast majority of job
 applicants, including Plaintiff; and

(v) Clear judicial and administrative guidance—dating back to at least the
 1990s—regarding a company's FCRA responsibilities exists and is readily

1 available explaining that such disclosures must stand-alone. This readily-
2 available guidance means Lowe's either was aware of its responsibilities or
3 plainly should have been aware of its responsibilities but ignored them and
4 violated the FCRA anyway.

5 (vi) The Ninth Circuit has clearly articulated the law in this area in a series
6 of cases; beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017);
7 *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019);
8 and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus,
9 at this point in time there is no excuse for a company like Lowe's to be in
10 noncompliance with the FCRA's clear and unambiguous requirements.

11 **RESPONSE:** First Advantage is without knowledge or information sufficient
12 to form a belief as to the truth of the allegations in paragraph 57 of the Second Amended
13 Complaint. Accordingly, those allegations are denied.

14 58. Plaintiff and the Lowe's Class seek damages under 15 U.S.C. § 1681n, *et seq.*
15 Indeed, Plaintiff and the Lowe's Class are entitled to statutory damages of not less than
16 \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15
17 U.S.C. § 1681n(a)(1)(A).

18 **RESPONSE:** First Advantage is without knowledge or information sufficient
19 to form a belief as to the truth of the allegations in paragraph 58 of the Second Amended
20 Complaint. Accordingly, those allegations are denied.

21 59. In the alternative, Plaintiff and the Lowe's Class seek actual damages under
22 15 U.S.C. § 1681o, *et seq.* Lowe's acted negligently by failing to provide a standalone
23 disclosure. Had Lowe's provided a standalone disclosure, Plaintiff and the class members
24 would not have authorized the procurement of their reports. As such, Lowe's breached its
25 duty of care to Plaintiff and the Lowe's Class and this breach is the direct and proximate
26 cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an
27 amount to be proven at trial or, at a minimum, seeks nominal damages.
28

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
 2 to form a belief as to the truth of the allegations in paragraph 59 of the Second Amended
 3 Complaint. Accordingly, those allegations are denied.
 4

5 60. Accordingly, under the FCRA, Plaintiff and the Lowe's Class seek statutory
 6 damages, reasonable cost and attorneys' fees, pre- and post-judgment interest, and such
 7 other relief as the Court deems necessary, reasonable, and just.

8 **RESPONSE:** First Advantage is without knowledge or information sufficient
 9 to form a belief as to the truth of the allegations in paragraph 60 of the Second Amended
 10 Complaint. Accordingly, those allegations are denied.
 11

12 COUNT II

13 61. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
 14 herein.

15 **RESPONSE:** First Advantage repeats and incorporates the foregoing responses
 16 as if fully stated herein.
 17

18 62. The FCRA declares that:

19 Except as provided in subparagraph (B), a person may not procure a
 20 consumer report, or cause a consumer report to be procured, for
 21 employment purposes with respect to any consumer, unless—

22 (i) a clear and conspicuous disclosure has been made in writing to the
 23 consumer at any time before the report is procured or caused to be
 24 procured, in a document that consists solely of the disclosure, that a
 25 consumer report may be obtained for employment purposes

26 15 U.S.C. § 1681b(b)(2)(A) (emphasis added).

27 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681b(b)(2)(A) states:
 28 “Except as provided in subparagraph (B), a person may not procure a consumer report, or
 cause a report to be procured, for employment purposes with respect to any consumer,

1 unless – (i) a clear and conspicuous disclosure has been made in writing to the consumer
2 at any time before the report is procured or caused to be procured, in a document that
3 consists solely of the disclosure, that a consumer report may be obtained for employment
4 purposes; and (ii) the consumer has authorized in writing (which authorization may be
5 made on the document referred to in clause (i)) the procurement of the report by that
6 person.” First Advantage denies any and all remaining allegations in paragraph 62 of the
7
8 Second Amended Complaint.
9

10 63. The FCRA defines a consumer report as:

11 “. . . any written oral or other communication of any information by a consumer
12 reporting agency bearing on a consumers’ credit worthiness, credit standing, cred-it
13 capacity, character, general reputation, personal characteristics, or mode of living
14 which is used or excepted to be used or collected in whole or in part for the purpose
15 of serving as a factor establishing the consumer’s eligibility for . . .

16 (B) employment purposes . . .

17 15 U.S.C. § 1681a(d)(1).

18 **RESPONSE:** First Advantage admits that 15 U.S.C. § 1681a(d)(1) states “The
19 term ‘consumer report’ means any written, oral, or other communication of any
20 information by a consumer reporting agency bearing on a consumer’s credit worthiness,
21 credit standing, credit capacity, character, general reputation, personal characteristics, or
22 mode of living which is used or expected to be used or collected in whole or in part for the
23 purpose of serving as a factor in establishing the consumer’s eligibility for—(A) credit or
24 insurance to be used primarily for personal, family, or household purposes; (B)
25 employment purposes; or (C) any other purpose authorized under section 1681b of this
26
27
28

1 title.” First Advantage denies any and all remaining allegations in paragraph 63 of the
2 Second Amended Complaint.

3 64. Lowe’s background checks are consumer reports.
4

5 **RESPONSE:** First Advantage is without knowledge or information sufficient
6 to form a belief as to the truth of the allegations in paragraph 64 of the Second Amended
7 Complaint. Accordingly, those allegations are denied.
8

9 65. In addition to failing to stand-alone, Lowe’s disclosure also willfully violated
10 the FCRA by not being clear and conspicuous. The disclosure repeatedly and confusingly
11 informs Plaintiff and the Class Members that Lowe’s may obtain consumer reports
12 regarding both them and their children or wards. The scope of the consumer reports can
13 also include information concerning the applicant’s or their children’s or ward’s credit
14 worthiness, credit standing, credit capacity, character, general reputation, personal
15 characteristics, mode of living, history, criminal history, social security verification, motor
16 vehicle records, verification of your education or employment history, or other background
17 check results. The inclusion of multiple disclosures regarding applicants and their children
18 or wards renders the disclosure confusing and cannot be said to be “clear and conspicuous”.
19

20 **RESPONSE:** First Advantage is without knowledge or information sufficient
21 to form a belief as to the truth of the allegations in paragraph 65 of the Second Amended
22 Complaint. Accordingly, those allegations are denied.
23

24 66. The disclosure also confusingly includes conflicting information regarding
25 the procurement of credit information. Again, Lowe's discloses that a consumer report may
26 contain information relating to the applicant’s or their children’s credit worthiness, credit
27 standing, and credit capacity. Then, in the very next paragraph, Lowe’s purports to explain
28 that it will not request any information related to applicant’s or their children’s “worthiness,
credit standing, or credit capacity” unless it provides a separate disclosure and
authorization for credit information. The unnecessary inclusion of this conflicting
information detracts from the purpose of the disclosure and renders the disclosure
confusing.

1 **RESPONSE:** First Advantage is without knowledge or information sufficient
2 to form a belief as to the truth of the allegations in paragraph 66 of the Second Amended
3 Complaint. Accordingly, those allegations are denied.
4

5 67. In short, the pre-report disclosure that Lowe's provided to Plaintiff and the
6 Lowe's Class members willfully violated the FCRA by not being clear and conspicuous.
7 Indeed, a reasonable person would have been confused by the disclosure.

8 **RESPONSE:** First Advantage is without knowledge or information sufficient
9 to form a belief as to the truth of the allegations in paragraph 67 of the Second Amended
10 Complaint. Accordingly, those allegations are denied.
11

12 68. Plaintiff and the other class members wouldn't have authorized the reports
13 had appropriate disclosures been provided.

14 **RESPONSE:** First Advantage is without knowledge or information sufficient
15 to form a belief as to the truth of the allegations in paragraph 68 of the Second Amended
16 Complaint. Accordingly, those allegations are denied.
17

18 69. Defendant procured consumer reports with respect to Plaintiff and the Lowe's
19 Class. The disclosures provided to Plaintiff were the same or substantially the same as the
20 one provided to all Lowe's Class members. Thus, Defendant uniformly violated the FCRA
21 rights of all Class members in the same way and, in the process, violated their right to
22 information and their privacy rights as delineated by Congress.

23 **RESPONSE:** First Advantage admits that on February 26, 2022, Lowe's
24 ordered a background report regarding Plaintiff from its subsidiary First Advantage
25 Background Services Corp. First Advantage is without knowledge or information
26 sufficient to form a belief as to the remaining allegations in paragraph 69 of the Second
27 Amended Complaint.
28

70. Defendant's violation of 15 U.S.C. § 1681b(b)(2)(A)(i) was willful for at least the following reasons:

(i) The rule that FCRA disclosures be "clear and conspicuous" has been

the law established for well over a decade;

(ii) Lowe's is a large company who regularly engages outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such any violations were made in conscious disregard of the rights of others;

(iii) Lowe's previously settled a class action lawsuit for alleged violations of the FCRA's clear and conspicuous disclosure requirements. As such, its failure to comply with the FCRA cannot be seen as anything other than a willful defiance of the Act's requirements;

(iv) Lowe's inclusion of the disclosures relating to applicant's children or wards was intentional and serves no purpose to the vast majority of job applicants, including Plaintiff; and

(v) Clear judicial and administrative guidance—dating back to at least the 1990s—regarding a company's FCRA responsibilities exists and is readily available explaining that such disclosures must be clear and conspicuous. This readily-available guidance means Lowe's either was aware of its responsibilities or plainly should have been aware of its responsibilities but ignored them and violated the FCRA anyway.

(vi) The Ninth Circuit has clearly articulated the law in this area in a series of cases, beginning in 2017: *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017); *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019); and *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082, 1095 (9th Cir. 2020). Thus, at this point in time there is no excuse for a company like Lowe's to be in noncompliance with the FCRA's clear and unambiguous requirements.

RESPONSE: First Advantage is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70 of the Second Amended Complaint. Accordingly, those allegations are denied.

71. Plaintiff and the Lowe's Class seek damages under 15 U.S.C. § 1681n, *et seq.* Indeed, Plaintiff and the Lowe's Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

72. In the alternative, Plaintiff and the Lowe's Class seek actual damages under 15 U.S.C. § 1681o, *et seq.* Lowe's acted negligently by failing to provide a disclosure that was clear and conspicuous. Had Lowe's provided a clear and conspicuous disclosure, Plaintiff and the class members would not have authorized the procurement of their reports. As such, Lowe's breached its duty of care to Plaintiff and the Lowe's Class and this breach is the direct and proximate cause of Plaintiff's and the class members' damages. Plaintiff seeks actual damages in an amount to be proven at trial or, at a minimum, seeks nominal damages.

73. Accordingly, under the FCRA, Plaintiff and the Lowe's Class seek statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest and such other relief as the Court deems necessary, reasonable, and just.

COUNT III

RESPONSE: First Advantage repeats and incorporates the foregoing responses as if fully stated herein.

1 75. First Advantage is a “person” and a “consumer reporting agency” as defined
2 by 15 U.S.C. § 1681a(b) and (f).

3 **RESPONSE:** First Advantage denies the allegations in paragraph 75 of the
4 Second Amended Complaint.

5 76. Plaintiff and members of the First Advantage Class are “consumers” as that
6 term is defined by 15 U.S.C. § 1681a(c).

7 **RESPONSE:** First Advantage is without knowledge or information sufficient
8 to form a belief as to the truth of the allegations in paragraph 76 of the Second Amended
9 Complaint. Accordingly, those allegations are denied. First Advantage further denies that
10 the proposed “First Advantage Class” is a certifiable class.
11

12 77. The FCRA declares that “[w]henver a consumer reporting agency prepares a
13 consumer report it shall follow reasonable procedures to assure maximum possible
14 accuracy of the information concerning the individual about whom the report relates.” 15
15 U.S.C. § 1681e(b).
16

17 **RESPONSE:** Admitted.

18 78. First Advantage prepared inaccurate and materially misleading consumer
19 reports relating to Plaintiff’s prior criminal history, which had a negative impact on his
20 employment opportunities.

21 **RESPONSE:** First Advantage denies the allegations in paragraph 78 of the
22 Second Amended Complaint.
23

24 79. In preparing the report, First Advantage failed to follow reasonable
25 procedures to assure the maximum possible accuracy of the information contained in the
26 report. Indeed, First Advantage furnished a report containing three prior criminal
27 convictions with the disposition stated as “guilty.” This was inaccurate.
28

1 **RESPONSE:** First Advantage admits that in a background report it prepared
 2 regarding Plaintiff, three case reference numbers were included that listed “Disposition
 3 GUILTY.” First Advantage denies any and all remaining allegations in paragraph 79 of the
 4 Second Amended Complaint.
 5

6 80. While Plaintiff pleaded guilty to the three charges between 2006 and 2009, he
 7 has since taken steps to rehabilitate his standing in his community such that the disposition
 8 is no longer “guilty”.

9 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
 10 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
 11 other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
 12 include the restoration of the Defendant’s civil rights and his right to own firearms.” First
 13 Advantage is without knowledge or information sufficient to form a belief as to the truth
 14 of the remaining allegations in paragraph 80 of the Second Amended Complaint.
 15 Accordingly, those allegations are denied.
 16
 17
 18

19 81. On November 24, 2020, the Navajo County Superior Court issued an Order
 20 setting aside Plaintiff’s judgments of guilt (*see* Ex. B), which restored Plaintiff’s civil rights
 21 under Arizona law pursuant to A.R.S. § 13-905. The Order setting aside the judgments of
 22 guilt were made publicly available at
<https://apps.supremecourt.az.gov/publicaccess/minutes.aspx>.

23 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
 24 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
 25 other things, “IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
 26 include the restoration of the Defendant’s civil rights and his right to own firearms.” First
 27
 28

1 Advantage denies any and all remaining allegations in paragraph 81 of the Second
2 Amended Complaint.

3
4 82. The judgments setting aside guilt are not the same as a criminal conviction.
5 Rather, when a court sets aside a criminal conviction pursuant to A.R.S. § 13-905 and
6 includes a certificate of second chance, the individual's civil rights are restored, including
7 occupational rights. The restoration of rights includes the release of the individual from
8 barriers and disabilities in obtaining occupational licenses issued under Arizona Title 32.
9 *See* A.R.S. § 13-905(K). Further, Arizona law provides potential employers with protection
10 should they choose to hire individuals that have had their convictions set aside. *Id.*; *see*
11 *also* A.R.S. § 12-558.03, *et seq.*

12
13 **RESPONSE:** First Advantage admits that A.R.S. 13-905(K), as amended by
14 AZ LEGIS 3 (2023), 2023 Ariz. Legis. Serv. Ch. 3 (S.B. 1036) (WEST), currently states:

15
16 “If the court grants the application to set aside the judgment of guilt, the court’s order must
17 include a certificate of second chance if the person was convicted of any of the following:

18 1. A misdemeanor. 2. A class 4, 5 or 6 felony and at least two years have elapsed since the
19 person fulfilled the conditions of probation or sentence. 3. A class 2 or 3 felony and at least
20 five years have elapsed since the person fulfilled the conditions of probation or sentence.”

21 First Advantage admits that A.R.S § 12-558.03 currently states: “An employer is not liable
22 for hiring an employee or contracting with an independent contractor who has previously
23 been convicted of a criminal offense.” First Advantage denies any and all remaining
24 allegations in paragraph 82 of the Second Amended Complaint.

25
26 83. By failing to inform potential employers that a prior conviction was set aside,
27 First Advantage robs employers of critical information to make an informed decision
28 regarding potential applicants and the potential risks associated with hiring applicants.

1 **RESPONSE:** First Advantage denies the allegations in paragraph 83 of the
2 Second Amended Complaint.

3
4 84. By failing to adopt adequate procedures, First Advantage caused Plaintiff and
5 the class members actual harm by preparing and providing inaccurate and materially
6 misleading consume [*sic*] reports to third parties.

7 **RESPONSE:** First Advantage denies the allegations in paragraph 84 of the
8 Second Amended Complaint.

9 85. On information and belief, First Advantage has prepared more than one report
10 regarding Plaintiff that contained the same inaccurate information.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 85 of the
12 Second Amended Complaint.

13
14 86. On information and belief, First Advantage's inclusion of the "guilty"
15 disposition on Plaintiff's consumer report violated its own written policies and procedures
16 to ensure the maximum possible accuracy of the information contained in consumer
17 reports.

18 **RESPONSE:** First Advantage denies the allegations in paragraph 86 of the
19 Second Amended Complaint.

20 87. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
21 Advantage is liable to Plaintiff and the First Advantage Class for failing to implement and
22 follow reasonable procedures to assure the maximum possible accuracy of Plaintiff's and
23 the class members' consumer reports in violation of 15 U.S.C. § 1681e(b).

24 **RESPONSE:** First Advantage denies the allegations in paragraph 87 of the
25 Second Amended Complaint. First Advantage further denies that the proposed "First
26 Advantage Class" is a certifiable class.
27
28

1 88. Defendant's violation of 15 U.S.C. § 1681e(b) was willful for at least the
2 following reasons:

3 (i) The rule that consumer reporting agencies must implement and follow
4 reasonable procedures to assure the maximum possible accuracy of the information
5 contained in consumer reports has been the law established for decades;

6 (ii) On information and belief, First Advantage adopted and then failed to follow
7 its own written policies and procedures to ensure the maximum possible accuracy of
8 the information contained in consumer reports;

9 (iii) First Advantage commenced the search for Plaintiff's criminal history on
10 February 26, 2022 and completed the report on March 2, 2022. Hence, ample time
11 existed for First Advantage to ensure that the criminal convictions were reported
12 accurately;

13 (iv) The report prepared by First Advantage regarding Plaintiff noted that
14 "Research [was] In Progress" for four days and further noted that "Additional
15 handling [was] required" with respect to Plaintiff's criminal history. Despite this
16 additional research and handling, First Advantage failed to report Plaintiff's or the
17 class members' criminal convictions accurately;

18 (v) The Order setting aside Plaintiff's judgment of guilt and restoring his civil
19 rights has been publicly available for over a year at the time the report was furnished;

20 (vi) First Advantage is a large corporation who regularly engages inside and
21 outside counsel—it had ample means and opportunity to seek legal advice regarding
22 its FCRA responsibilities. As such, any violations were made in conscious disregard
23 of the rights of others;

24 (vii) First Advantage describes itself as a leader in the background reporting
25 industry with respect to employment related consumer report;

26 (viii) First Advantage regularly finishes consumer reports to businesses, such as
27 Lowe's, or the purpose of making employment related decisions. Accordingly, First
28 Advantage's failure to implement reasonable procedures had a widespread effect;
and

(ix) First Advantage profited off the sale of Plaintiff's and the class members'
consumer reports containing incomplete and outdated information on a repeated
basis.

24 **RESPONSE:** First Advantage denies the allegations in paragraph 88 of the
25 Second Amended Complaint.

26 89. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. §
27 1681n, *et seq.* Indeed, Plaintiff and the First Advantage Class are entitled to statutory
28

1 damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful
2 violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

3 **RESPONSE:** First Advantage denies the allegations in paragraph 89 of the
4 Second Amended Complaint. First Advantage further denies that the proposed "First
5 Advantage Class" is a certifiable class.
6

7 90. In the alternative, Plaintiff and the First Advantage Class seek actual damages
8 under 15 U.S.C. § 1681o, *et seq.* First Advantage acted negligently by failing to adopt
9 reasonable procedures to ensure the maximum possible accuracy of information contained
10 in consumer reports. As such, First Advantage breached its duty of care to Plaintiff and the
11 First Advantage Class and this breach is the direct and proximate cause of Plaintiff's and
12 the class members' damages. Plaintiff seeks actual damages in an amount to be proven at
13 trial or, at a minimum, seeks nominal damages.

14 **RESPONSE:** First Advantage denies the allegations in paragraph 90 of the
15 Second Amended Complaint. First Advantage further denies that the proposed "First
16 Advantage Class" is a certifiable class.

17 91. Accordingly, under the FCRA, Plaintiff and the First Advantage Class seek
18 statutory damages, reasonable cost and attorneys' fees, pre- and post-judgment interest and
19 such other relief as the Court deems necessary, reasonable, and just.

20 **RESPONSE:** First Advantage denies the allegations in paragraph 91 of the
21 Second Amended Complaint. First Advantage further denies that the proposed "First
22 Advantage Class" is a certifiable class.
23

24 COUNT IV

25 92. Plaintiff incorporates by reference the foregoing allegations as if fully set forth
26 herein.
27
28

1 **RESPONSE:** First Advantage repeats and incorporates the foregoing responses
2 as if fully stated herein.

3 93. First Advantage is a “person” and a “consumer reporting agency” as defined
4 by 15 U.S.C. § 1681a(b) and (f).

5 **RESPONSE:** First Advantage denies the allegations in paragraph 93 of the
6
7 Second Amended Complaint.

8 94. Plaintiff and members of the First Advantage Class are “consumers” as that
9 term is defined by 15 U.S.C. § 1681a(c).

10 **RESPONSE:** First Advantage is without knowledge or information sufficient
11
12 to form a belief as to the truth of the allegations in paragraph 94 of the Second Amended
13 Complaint. First Advantage further denies that the proposed “First Advantage Class” is a
14 certifiable class.

15
16 95. The FCRA declares that:

17 A consumer reporting agency which furnishes a consumer report for employment
18 purposes and which for that purpose compiles and reports items of information on
19 consumers which are matters of public record and are likely to have an adverse effect
upon a consumer's ability to obtain employment shall--

20 (1) at the time such public record information is reported to the user of such
21 consumer report, notify the consumer of the fact that public record
22 information is being reported by the consumer reporting agency, together with
the name and address of the person to whom such information is being
reported; or

23 (2) maintain strict procedures designed to insure that whenever public record
24 information which is likely to have an adverse effect on a consumer's ability
25 to obtain employment is reported it is complete and up to date. For purposes
26 of this paragraph, items of public record relating to arrests, indictments,
27 convictions, suits, tax liens, and outstanding judgments shall be considered up
to date if the current public record status of the item at the time of the report
is reported.

28 15 U.S.C. 1681k(a) (emphasis added).

1 **RESPONSE:** Admitted.

2
3 96. First Advantage furnished consumer reports regarding Plaintiff and the First
4 Advantage Class for employment purposes that possessed information on consumers that
5 were likely to have an adverse effect upon a consumer's ability to obtain employment.

6 **RESPONSE:** First Advantage denies the allegations in paragraph 96 of the
7 Second Amended Complaint.

8 97. First Advantage violated Section 1681k(a)(2) by failing to adopt strict
9 procures [*sic*] designed to insure that public record information that is likely to have an
10 adverse effect on a consumer's ability to obtain employment is complete and up to date.

11 **RESPONSE:** First Advantage denies the allegations in paragraph 97 of the
12 Second Amended Complaint.

13
14 98. First Advantage also failed to provide Plaintiff and the First Advantage Class
15 with notice that First Advantage was reporting public record information to potential
16 employers that was likely to have an adverse effect on the ability of Plaintiff and the First
17 Advantage Class to obtain employment. Further, First Advantage failed to provide Plaintiff
18 or the other members of the First Advantage Class with the name and address of the person
19 to whom such information was being reported.

20 **RESPONSE:** First Advantage denies the allegations in paragraph 98 of the
21 Second Amended Complaint.

22 99. Criminal convictions or information showing "guilty" with respect to crimes
23 is likely to have an adverse effect on a consumer's ability to obtain employment.

24 **RESPONSE:** First Advantage denies the allegations in paragraph 99 of the
25 Second Amended Complaint.

26
27 100. Here, First Advantage reported the disposition of past criminal convictions for
28 Plaintiff and the Class as "guilty". This was inaccurate. Records of past criminal
convictions are public records under the FCRA. At the time the report was furnished, the

1 convictions were set aside and Plaintiff's and the class members' civil rights were restored
2 pursuant to A.R.S. § 13-905.

3 **RESPONSE:** First Advantage admits that a Minute Entry by the Superior Court
4 of the State of Arizona in and for the County of Navajo, dated 11/24/2020 states, among
5 other things, "IT IS ORDERED granting the Motion to Set Aside Judgment of Guilt to
6 include the restoration of the Defendant's civil rights and his right to own firearms." First
7 Advantage admits that in a background report it prepared regarding Plaintiff, three case
8 reference numbers were included that listed "Disposition GUILTY." First Advantage
9 denies any and all remaining allegations in paragraph 100 of the Second Amended
10 Complaint.
11
12
13

14 101. By publishing past criminal convictions without their current disposition, First
15 Advantage reported adverse public information that was not complete or up to date.

16 **RESPONSE:** First Advantage denies the allegations in paragraph 101 of the
17 Second Amended Complaint.
18

19 102. First Advantage failed to adopt strict procedures to ensure that criminal
20 convictions are reported with the current disposition. This constitutes a willful violation of
21 Section 1681k(a)(2).

22 **RESPONSE:** First Advantage denies the allegations in paragraph 102 of the
23 Second Amended Complaint.
24

25 103. On information and belief, First Advantage's failure to report that the criminal
26 convictions were set aside and that civil rights were restored violated its own written
27 policies and procedures to ensure that information contained in consumer reports is
28 complete and up to date.

1 **RESPONSE:** First Advantage denies the allegations in paragraph 103 of the
2 Second Amended Complaint.

3
4 104. By failing to adopt strict procedures or provide any notice, First Advantage
5 harmed applicant and employees by conveying inaccurate information regarding their
6 criminal history to third parties and deprived applicants and employees of the ability to
7 address any inaccurate or incomplete information contained within the consumer report
8 prior to the employer's decision regarding the information.

9 **RESPONSE:** First Advantage denies the allegations in paragraph 104 of the
10 Second Amended Complaint.

11 105. Pursuant to 15 U.S.C. § 1681o, *et seq.* and 15 U.S.C. § 1681n, *et seq.*, First
12 Advantage is liable to Plaintiff and the First Advantage Class for failing to provide notice
13 that potentially adverse public record information was being reported or by failing to
14 implement and follow strict procedures to ensure that information contained in Plaintiff's
15 and the class members' consumer reports that was likely to adversely impact their ability
16 to obtain or keep employment was complete and up to date in violation of 15 U.S.C. §
17 1681k(a)(2).

18 **RESPONSE:** First Advantage denies the allegations in paragraph 105 of the
19 Second Amended Complaint. First Advantage further denies that the proposed "First
20 Advantage Class" is a certifiable class.

21 106. First Advantage's violation of 15 U.S.C. § 1681k(a)(2) was willful for at least
22 the following reasons:

- 23 (i) The rule that consumer reporting agencies must implement and
24 follow strict procedures to insure that potentially adverse public record
25 information contained in consumer reports must be complete and up to
26 date has been the law established for decades;
27 (ii) The rule that consumer reporting agencies provide notice that
28 potentially adverse public record information is being reported by a
consumer reporting agency has been the law established for decades;
 (iii) On information and belief, First Advantage adopted and then failed
to follow its own written policies and procedures to ensure that
information contained in consumer reports is complete and up to date;

(iv) First Advantage commenced the search for Plaintiff's criminal history on February 26, 2022 and completed the report on March 2, 2022. Hence, ample time existed for First Advantage to ensure that the criminal convictions were up to date and complete;

(v) The report prepared by First Advantage regarding Plaintiff noted that "Research [was] In Progress" for four days and further noted that "Additional handling [was] required" with respect to Plaintiff's criminal history;

(vi) The Order setting aside Plaintiff's judgment of guilt and restoring his civil rights has been publicly available for over a year at the time the report was furnished;

(vii) First Advantage is a large corporation who regularly engages inside and outside counsel—it had ample means and opportunity to seek legal advice regarding its FCRA responsibilities. As such, any violations were made in conscious disregard of the rights of others;

(viii) First Advantage describes itself as a leader in the background reporting industry with respect to employment related consumer reports;

(ix) First Advantage regularly furnishes consumer reports to businesses, such as Lowe's, for the purpose of making employment related decisions Accordingly, First Advantage's failure to implement reasonable procedures had a wide spread effect; and

(x) First Advantage profited off the sale of Plaintiff's and the class members' consumer reports containing incomplete and outdated information on a repeated basis.

RESPONSE: First Advantage denies the allegations in paragraph 106 of the Second Amended Complaint.

107. Plaintiff and the First Advantage Class seek damages under 15 U.S.C. § 1681n, *et seq.* Plaintiff and the First Advantage Class are entitled to statutory damages of not less than \$100 and not more than \$1,000 for each of Defendant's willful violations pursuant to 15 U.S.C. § 1681n(a)(1)(A).

RESPONSE: First Advantage denies the allegations in paragraph 107 of the Second Amended Complaint. First Advantage further denies that the proposed "First Advantage Class" is a certifiable class.

AFFIRMATIVE DEFENSES

Without waiving any non-affirmative defenses that are not stated herein and without assuming the burden of proof on any defense where the law provides otherwise, First Advantage submits its affirmative and other defenses to the claims set forth in the Second Amended Complaint as follows:

FIRST AFFIRMATIVE DEFENSE

To the extent Plaintiff has failed to mitigate his alleged damages, any recovery should be reduced accordingly.

SECOND AFFIRMATIVE DEFENSE

The damages Plaintiff seeks must be set off against any settlement or other recoveries by Plaintiff.

THIRD AFFIRMATIVE DEFENSE

Because First Advantage acted, at all times relevant to the Second Amended Complaint, in a good faith effort to comply with the FCRA, and because any alleged violation would not have been willful, Plaintiff is not entitled to punitive damages.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims made in the Second Amended Complaint on behalf of Plaintiff and/or members of the proposed classes are barred by release. To the extent Plaintiff and/or any members of the proposed First Advantage Class were members of previous actions against First Advantage

1 in which a release was provided to First Advantage that would cover some or all of their
2 claims in this lawsuit, then those claims have been released. The extent to which this
3 defense is applicable, and whether additional grounds exist in support of this defense, will
4 be developed through discovery.
5

6 **FIFTH AFFIRMATIVE DEFENSE**
7

8 Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims
9 made in the Second Amended Complaint on behalf of Plaintiff and/or members of the
10 proposed classes are barred by judicial estoppel. To the extent Plaintiff and/or any members
11 of the proposed First Advantage Class have taken a position in prior legal matters that is
12 contrary to a position they are taking in this lawsuit, they would be judicially estopped
13 from taking that position in this lawsuit. The extent to which this defense is applicable, and
14 whether additional grounds exist in support of this defense, will be developed through
15 discovery.
16
17
18

19 **SIXTH AFFIRMATIVE DEFENSE**
20

21 Plaintiff's claims are subject to dismissal, in whole or in part, to the extent the claims
22 made in the Second Amended Complaint on behalf of Plaintiff and/or members of the
23 proposed classes are barred by res judicata and/or collateral estoppel. To the extent Plaintiff
24 and/or any members of the proposed First Advantage Class were members of previous
25 actions against First Advantage that were subject to dispositive rulings regarding matters
26 that are at issue in this lawsuit, those rulings have a res judicata, collateral estoppel and/or
27
28

1 issue preclusion effect on those matters here. The extent to which this defense is applicable,
2 and whether additional grounds exist in support of this defense, will be developed through
3 discovery.
4

5 **SEVENTH AFFIRMATIVE DEFENSE**

6 The proposed class is not certifiable because it does not comply with the requirement
7 of Rule 23 of the Federal Rules of Civil procedure.
8

9 WHEREFORE, having fully responded to the Second Amended Complaint, First
10 Advantage respectfully requests that the Court enter an Order denying all of the claims
11 against First Advantage in the Amended Complaint, that judgment be rendered in favor of
12 First Advantage and against Plaintiff with respect to all claims against First Advantage,
13 and that First Advantage be granted such other and further relief as the Court deems just,
14 equitable, and proper.
15
16

17 Respectfully submitted this 7th day of September, 2023.
18

19 /s/ Mandi J. Karvis

20 Mandi J. Karvis/Bar No. 021858

21 Bar No. 021858

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9
10 *Counsel for Defendant First Advantage*
11 *Background Services Corp.*

12
13 **CERTIFICATE OF SERVICE**

14 The undersigned hereby certifies that a true and accurate copy of the above titled
15 document was served upon counsel of record by filing such papers via the Court's ECF
16 system on September 7, 2023.

17 /s/ Mandi J. Karvis
18 Mandi J. Karvis
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